Southwestern Bell Mobile Systems

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Bruce E. Beard
Attorney

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, DC
20554

RE: FCC Docket No. RM-8643; Filing of Erratum--Reply Comments of Southwestern Bell Mobile Systems, Inc.

Dear Mr. Caton,

It has come to our attention that page 8 of the above-referenced Reply Comments was inadvertently omitted from the original and 9 copies filed with the Commission on June 30, 1995 and from the copies served on the parties of record.

Enclosed please find 11 copies of Southwestern Bell Mobile Systems, Inc.'s Reply Comments with the missing page 8 inserted. Please file 10 copies with the papers in this proceeding and return one copy, file stamped, to our courier.

Please also be advised that we have served each of the parties of record with a copy with the missing page 8 inserted.

We apologize for any inconvenience and if you have any questions please contact me on 214-733-2180.

Bruce E. Beard

Enclosure

BEB:smh

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Erratum
Certificate of Service

This is to certify that a copy of Southwestern Bell Mobile Systems, Inc.'s Reply Comments with the omitted page 8 inserted was served on the 3rd day of July, 1995, by first class, U.S. mail, postage prepaid to the following:

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7/5/95 Erratum
Page 8 inadvertently omitted from
Original Filing of 6/30/95

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Rulemaking of Pacific Bell Mobile Services Regarding a Plan for Sharing the Costs of Microwave Relocation	))))	Docket No. RM-8643

REPLY COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.

Southwestern Bell Mobile Systems, Inc. (SBMS) files this Reply to Comments submitted in response to the Petition for Rulemaking filed by Pacific Bell Mobile Services ("PBMS"). SBMS supports the establishment of a Rulemaking proceeding to address the various raised in the PBMS Petition for Rulemaking issues regarding sharing of microwave relocation costs.[1] The Rulemaking should also be used to resolve questions which, if left unanswered and ambiguous, will continue to plague and delay the relocation process.

I. The Commission Should Establish a Rulemaking

A review of various Comments indicate that there is a need to set rules for sharing the cost of relocation,[2] that there

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[1] See, SBMS Comments filed June 15, 1995 (SBMS Initial Comments); Informal Supplemental Comments of Southwestern Bell Mobile Systems, Inc. in Support of the Petition for Rulemaking of Pacific Bell Mobile Services, filed June 27, 1995 (SBMS Supplemental Comments) (Copy attached as Exhibit 1).

[2] See, Personal Communications Industry Association (PCIA) Comments, pp. 6-8; Cox Comments, p.2; UTC Comments, pp. 3-4; PBMS Petition for Rulemaking, pp. 2-7.

is uncertainty as to the relocation process[3] and that some incumbent licensees are viewing the process as an economic windfall to gain total replacement of systems and/or unnecessary upgrades of systems.[4] Such uncertainty and expectations of enrichment views will only serve to delay the relocation process and thus delay the implementation of PCS. By establishing a Rulemaking the Commission can remove the uncertainty and advance the relocation process. In addition to addressing the issues regarding shared microwave relocation costs, the Rulemaking should be used to:

1. define the concept of interference,[5]

2. establish rules to give the PCS providers the opportunity to demonstrate that "interference" may be avoided by less expensive means than relocation of the path,[6]

3. make clear that incumbent licensees are not unjustly enriched,[7]

4. establish parameters for the definition of "comparable facilities",[8]

5. limit the payment costs under proposed Section 101.69(c)(1) to costs that are reasonably incurred and/or are reasonable in amount,[9]

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[3]See, Cox Comments, pp. 2-4; BellSouth Comments, pp. 4-5, Sprint Comments, pp. 5.

[4]See, Sprint Comments, pp. 4-6; BellSouth, pp. 6-7.

[5]SBMS Initial Comments, pp. 3-5; Cox Comments, pp. 2-4;

[6]SBMS Initial Comments, pp. 4-5.

[7]Sprint Comments, pp. 4-6; BellSouth Comments, pp. 6-7; SBMS Initial Comments, pp. 6-7.

[8]SBMS Supplemental Comments, pp. 2-4.

[9]SBMS Supplemental Comments, pp. 4-5.

6. establish specific rules for dispute resolution, including mandatory use of alternative dispute resolution,[10] and

7. clearly establish the parameters for status as a primary licensee in a particular system versus a secondary licensee.[11]

II. Claims that the Commission Should Do Nothing Should Be Rejected

Some commentors claim that the Commission should deny the Petition and simply do nothing--that the "process" should be allowed "work".[12] The problem is that the process as of this date has inherent flaws which will prevent it from working efficiently, and possibly from working at all. The proposals regarding focusing on freedom from interference rights and the sharing of microwave relocation costs are designed to ease the economic burdens and disincentive of being the initial provider seeking to relocate an incumbent licensee. Merely doing nothing will continue such disincentives and delay relocations, thus thwarting the implementation of PCS.

As noted above, several parties have identified various inherent defects and ambiguities in the relocation process.[13] It is better for the Commission to recognize the defects and seek to cure them rather than to allow such defects to stall the process. Likewise it is better for the Commission to recognize the ambiguity

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[10]See, SBMS Supplemental Comments, pp. 5-6.

[11]See, SBMS Supplemental Comments, pp. 6-8.

[12]See, American Petroleum Institute Comments, pp. 9-10; Duncan, Weinberg, Miller & Pembroke, P.C. Comments, pp. 5-7.

[13]See. pp. 2-3 supra.

or lack of definitional standards and address them in a Rulemaking proceeding rather than to have individual parties involved in litigation to resolve the ambiguities and differences of opinion as to meaning.

A. The Length of the Negotiation Periods Hamper Relocation

As various parties have noted, the "voluntary" negotiation period has become merely a way for the incumbent licensees to seek an undeserved premium, above the actual cost of comparable facilities, to be relocated. As explained in the attached affidavit, in discussions with at least one incumbent licensee power company, the demand upon SBMS has not been merely to provide comparable facilities to replace the microwave link subject to interference but rather the replacement of the entire system with an upgrade from analog to digital (See Exhibit 2). Sprint reports similar experiences.[14] Demands for upgrades and payments far beyond "comparable facilities" are not surprising during the voluntary relocation stage and in fact are openly encouraged by industry consultants.[15] Incumbent licensees have been advised that "comparable facilities" is "your worst case scenario" and that "upgraded, digital facilities" is a bargaining position.[16] As the

[14]Sprint Comments, pp. 4-5.

[15]See, Exhibit 3.

[16]See, Exhibit 3.

consultant states the "issue of 'comparable facilities' has almost nothing to do with this phase of the negotiations".[17]

Merely doing nothing, as suggested by commentors, will likely result in little relocation during the voluntary period because incumbents have little incentive to lower their demands for entire system replacements, upgrades or overpriced buyouts. The Commission should not should not merely do nothing. Rather, the Commission should investigate, through a Rulemaking to judge the impact of the "voluntary relocation" period and decide whether it is serving a useful purpose or is merely delaying relocation efforts. SBMS supports the position advocated by Sprint that the voluntary relocation period should be limited to six months with a mandatory negotiation period of one year.[18]

B. Definitional Standards are Needed for "Interference" and "Comparable Facilities"

The PBMS cost sharing plan is premised on the transfer of the non-interference rights from the incumbent license holder to the moving provider.[19] In fact, the relocation obligation is based upon "interference" with an existing link. Obviously, the standard used to determine "interference" is key to the whole inquiry. Thus, as Cox Enterprises notes, it is important that the Commission adopt or endorse objective standards to determine adjacent channel

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[17]See, Exhibit 3.

[18]Sprint Comments, p. 7.

[19]PBMS Petition, p. 7.

interference.[20] As Cox correctly notes, Bulletin 10-F, which is relied on in the PBMS proposal as providing interference criteria[21] contains microwave-to-microwave standards that "do not lend themselves directly to assessing PCS-microwave interference" and does not address or assess adjacent channel interference or differences in terrain.[22] The Commission should seek comments on establishing a predictable, objective standard. As noted in SBMS' initial comments, such standard should include flexibility for the PCS provider to demonstrate that interference with a relocated path could have been avoided through less expensive means, such as merely replacing older and lesser quality receivers, antennas or filters.[23]

The Rulemaking should also establish the parameters for what constitutes "comparable facilities". Current rules do not contain a standard for "comparable facilities". To simply ignore the ambiguity, do nothing and give the process an opportunity "to work" as suggested by some commentors will result in disputes and litigation over what constitutes "comparable facilities". The Commission should give some guidance, through the establishment of

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[20]Cox Comments, pp. 2-4.

[21]PBMS Petition, p.8.

[22]Cox Comments, p. 3.

[23]SBMS Comments, pp. 4-5.

parameters for "comparable facilities" both for microwave facilities and alternative media facilities.[24]

III. The Cost Sharing Formula Must Include a Cap

An essential element of the Cost Sharing Formula proposed by PBMS, and modified by PCIA, is the inclusion of a cap on the amount of money the initial relocator can recover from subsequent providers who would have interfered.[25] The cap is essential because it protects later providers from having to pay a premium merely because the initial relocator agreed to pay a premium for the relocation. It also provides an incentive for the initial relocator to be economically efficient in its offer for relocation and avoids later disputes amongst PCS providers over the legitimacy and/or reasonableness of the price paid.

Commentors representing incumbent licensees contend that the cap will set a ceiling above which no PCS provider will pay.[26] PCS providers, such as SBMS, likewise have concerns that the cap

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[24]See, SBMS Supplemental Comments, pp. 2-5. SBMS suggests that for a microwave facility to be comparable it must have; 1) the existing channel capacity of the relocated path; 2) the same reliability as the relocated path; 3) the new frequency should have the same growth potential in terms of the ability to expand the capacity of that path in the new spectrum (i.e., 6 GHz or 11 GHz, etc.); and the availability for backup if, but only if, the existing facility already provides redundancy. Similarly, an alternative media facility to be comparable should have, 1) the existing channel capacity of the relocated path; 2) the same path reliability; 3) the same growth potential; and 4) diversity or alternative routing capabilities offered by the existing microwave path.

[25]See, PBMS Comments, pp. 10-11; PCIA Comments, pp. 13-14.

[26]See, American Petroleum Institute Comments, p.6; City of San Diego Comments, p. 7.

will be a floor which incumbent licensees will use as the bare minimum they will accept. Speculation about whether the cap will be a floor or a ceiling during initial negotiations does not diminish the fact that a cap is an essential part of the cost sharing formula and is needed for the process to work efficiently.

SBMS believes that the caps proposed by PCIA are more appropriate than the figures proposed by PBMS. PCIA notes that the caps are consistent with "the record evidence of average link costs in the PCS docket".[27] Further, the Commission needs to clarify that the costs to be paid are those reasonably incurred or reasonable in amount.[28] The Commission should include the issue of the amount of the cap in its Rulemaking proceeding.

SBMS agrees with BellSouth's observation that the cost sharing analysis should be limited to costs associated with avoiding co-channel interference.[29] As BellSouth notes, while it is readily apparent that co-channel PCS licensees will benefit from the relocation of a particular facility, it is difficult to determine which PCS licensees will benefit from relocation on

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[27]PCIA Comments, pp. 13-14.

[28]SBMS Informal Comments, pp. 4-5. As noted therein, Section 101.69 creates an interesting dichotomy as it requires reimbursement to the incumbent licensee for all engineering, equipment, site and FCC costs without any limitation that those fees or costs be incurred reasonably or be reasonable in amount but limits reimbursement of additional costs that the incumbent licensee might incur as a result of operation in another band to "reasonable additional costs."

[29]BellSouth Comments, pp. 4-5.

adjacent facilities.[30] SBMS also supports BellSouth's position that only those co-channel PCS licensees in the market in which a given facility is located should be obligated to share the cost of relocation.[31] As BellSouth notes "the benefits of a simple, understandable, and straightforward policy greatly outweigh any loss in being able to allocate each minute cost to every imaginable beneficiary."[32]

IV. Other Issues

SBMS supports the UTC observation that the PBMS formula is too restrictive in that it fails to take into account that some relocation agreements may include creative "non-cash" solutions. As part of the Rulemaking the Commission should solicit input on if such non-cash solutions or elements should be valued for purposes of sharing relocation costs and, if so, the methodology of such valuation.

Finally, under the Commission's rules, microwave paths operated by incumbent licensees are entitled to relocation only if they are primary paths. As explained in SBMS' Informal Comments, incumbent microwave licensees may find it difficult to establish the primary status of microwave paths, and thus their right to relocation benefits. The Commission should thus include in its Rulemaking the issue of what information an incumbent microwave

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[30]BellSouth Comments, p. 4.

[31]BellSouth Comments, pp. 4-5.

[32]BellSouth Comments, p. 5.

provider must provide to establish its status as a primary licensee.[33]

V. Conclusion

For the reasons stated herein, in SBMS' initial Comments SBMS' Informal Supplemental Comments and the Comments of the various other parties, the Commission should grant the PBMS Petition for Rulemaking and establish a Rulemaking to address the various issues and ambiguities raised regarding microwave relocation.

Respectfully submitted,

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June 30, 1995

[33]See, SBMS Informal Comments, pp. 6-8.

Certificate of Service

I, Bruce E. Beard, an attorney for Southwestern Bell Mobile Systems, Inc. do hereby certify that copies of the foregoing Reply Comments of Southwestern Bell Mobile Systems, Inc. were served on the 30th day of June, 1995, by first class, U.S. mail, postage prepaid to the following:

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EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition for Rulemaking of Pacific Bell Mobile Services Regarding a Plan for Sharing the Costs of Microwave Relocation	))))	Docket No. RM-8643

INFORMAL SUPPLEMENTAL COMMENTS OF
SOUTHWESTERN BELL MOBILE SYSTEMS, INC.
IN SUPPORT OF THE PETITION FOR RULEMAKING
OF PACIFIC BELL MOBILE SERVICES

Pursuant to Section 1.41 of the Commission's Rules, Southwestern Bell Mobile Systems, Inc. ("SBMS") files these Informal Comments to supplement the record in the above-referenced matter.[1] As SBMS noted in its Comments in this matter, the PBMS Petition raises a number of significant issues which should be addressed in a Notice of Proposed Rulemaking.

SBMS is the high bidder for the licenses to provide PCS services in the Tulsa, Oklahoma, Little Rock, Arkansas and Memphis, Tennessee MTAs. SBMS is in the process of identifying and relocating incumbent microwave licensees in these markets. As

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[1] Pacific Bell Mobile Services filed its Petition for Rulemaking on May 5, 1995 (the "PBMS Petition"). The FCC established a comment cycle requiring initial Comments to be filed on June 15, 1995, with Reply Comments to be filed on June 30, 1995. SBMS filed Comments in this Rulemaking in a timely fashion (the "SBMS Comments"). SBMS requests that the Commission accept these informal comments in accordance with Section 1.41 of the Commission's Rules to facilitate the preparation of a complete Notice of Proposed Rulemaking in these important matters.

pointed out in the PBMS Petition and in SBMS' Comments, there are a number of issues which the Commission should address in a Notice of Proposed Rulemaking.[2]

I. The Commission Should Establish Parameters For the Definition of "Comparable Facilities

In the Commission's current Rules a PCS operator has an obligation to replace existing microwave facilities with a system that is "comparable" to the existing 2 GHz system.[3] In addition to the requirement for a PCS operator to provide an incumbent licensee with this facility, the incumbent licensee has one year from their acceptance of these facilities to demonstrate the new facilities were, in fact, not comparable to the former facilities. At that point in time the PCS operator has an obligation to upgrade these facilities previously accepted as comparable or reinstate the incumbent licensee's equipment which was previously relocated.[4]

Unfortunately, there is no standard established in the Commission's Rules to define what a comparable facility might mean. This creates significant ambiguity for both the incumbent microwave licensee and places the PCS operator at a significant disadvantage attempting to negotiate the relocation of an incumbent licensee.[5]

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[2] SBMS has suggested in its Comments a number of additional issues not raised in the PBMS filing which the Commission should address.

[3] See proposed Commission Rule at 47 C.F.R., § 101.69.

[4] See 101.69(e)(2). See attachment A.

[5] This becomes particularly important in urban areas where the existence of one or two microwave paths which, if not relocated, may prevent the PCS operator from being able

The Commission should in this NPRM seek comments on an appropriate definition of comparability. This definition of comparability will be particularly important when the PCS provider and incumbent licensee are considering alternative media as a replacement for the incumbent licensee's microwave facilities.[6]

SBMS suggests that a minimum comparability standard be established for both microwave facilities and alternative media such as fiber. For a microwave facility to be comparable it should have:

1. The existing channel capacity of the relocated path;
2. The same reliability as the relocated path;
3. The new frequency should have the same growth potential in terms of the ability to expand the capacity of that path in the new spectrum (i.e., 6 GHz or 11 GHz, etc.); and
4. The availability for backup if, but only if, the existing facility already provides redundancy.

In a similar vein, to meet the comparability standard, the alternative media facility should have:

1. The existing channel capacity of the relocated path;
2. The same path reliability;

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to turn on service. In light of the Commission's currently established two year voluntary negotiation period, followed by a one year mandatory negotiation period, this places incumbent licensees in the enviable position of being able to place a PCS operative's significant investment at risk.

[6] See 47 C.F.R.,§ 101.69(c)(2).

3. The same growth potential; and

4. Diversity or alternative routing capabilities offered by the existing microwave path.

SBMS would urge the Commission to seek comments on these issues in any NPRM issued as a result of this docket.

II. The Commission Should Seek Comments on the Viability of Narrowing the PCS Operator's Obligation to Pay "All Relocation" Versus "Reasonable Relocation" Costs

In proposed Commission Rule Section 101.69 the PCS provider has an obligation to reimburse an incumbent licensee for ". . . payment of all (emphasis added) relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium; . . . ."[7] This rule creates an interesting dichotomy. In the first instance, the PCS provider is to reimburse the incumbent licensee for all engineering, equipment, site and FCC fees without any limitation that these fees or costs be incurred reasonably or be reasonable in amount. The same rule on the other hand limits additional costs to "reasonable additional costs" that the incumbent licensee might incur as a result of operation in another band.

The rules section by its own terms can be interpreted to place no limits and to require no efforts on the part of the incumbent licensee in incurring costs for relocated paths. SBMS would urge

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[7] See Commission Rule Section 101.69(c)(1).

the Commission to seek comments on the appropriateness of modifying proposed Section 101.69(c)(1) to limit the payment of relocation costs to costs that are reasonably incurred and/or costs that are reasonable in amount. This rule definition should be considered in addition to any maximum price cap as proposed in the PBMS Petition. Since a reasonableness standard may prevent the costs from reaching the cap. Without such a standard, the cap proposed by PBMS may become a de facto floor. [8]

III. The Commission Should Establish Specific Rules for Dispute Resolution, Including Mandatory Use of Alternative Dispute Resolution

As currently written, the Commission's rules do not establish a specific mechanism for, nor an obligation to participate in binding arbitration. The Commission should seek comments on and should establish rules requiring binding arbitration in the event that an incumbent licensee and a PCS operator cannot agree on either the comparability of facilities and/or reasonable costs incurred in any relocation. In addition, SBMS urges the Commission to utilize a model similar to the major league baseball model of requiring the arbitrator to choose between the parties' proposals. This model should force all parties to suggest a commercially reasonable price and terms and conditions during the course of the negotiations since the arbitrator would be limited to choosing between the two alternatives proffered by the parties.

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[8] See PBMS Petition at pages 7 through 10.

While SBMS does not wish to overburden the Commission resources, we would suggest that the Commission is the appropriate arbitrator of these disputes. At a bare minimum SBMS would suggest that the Commission seek comments on the identification of an appropriate arbitrator, as well as comments regarding appropriate arbitration rules.

IV. The Commission's Current Rules Do Not Contain Sufficient Definition of the Status of Incumbent Primary and Secondary Microwave Paths

Under the Commission's current rules, microwave paths operated by incumbent licensees are entitled to relocation benefits only if they are primary paths.[9] This becomes particularly important because the term "secondary" is a term of art in the industry. A microwave path designated as secondary has certain obligations vis-a-vis a primary licensee in the same spectrum. These obligations include the modification of the system to eliminate any interference with the primary licensee in that spectrum, the obligation to turn off a path if it is interfering with a primary licensee, and to accept interference from the primary licensee.[10]

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[9] See proposed Commission Rule Section 101.69.

[10] SBMS has in excess of 60 FCC cellular licenses, including A-Band licenses in the Chicago, Illinois, Washington, D.C., Baltimore, Maryland, Boston, Massachusetts and Buffalo, Rochester and Syracuse, New York MSAs. In addition, SBMS holds B-Band cellular licenses in markets such as Dallas and San Antonio, Texas, Oklahoma City, Oklahoma, Kansas City, Missouri and St. Louis, Missouri MSAs. SBMS makes extensive utilization of 2 GHz microwave paths in the operation of these cellular licenses. As such, SBMS finds itself as both a PCS operator which must relocate incumbent licensees and an incumbent licensee which faces potential relocation by

Pursuant to the NPRM for FCC Docket ET-92-9, the FCC's microwave division issued a spectrum policy which stated that new paths licensed after January 16, 1992, would be granted secondary status. Public Notice, Federal Communications Commission issued May 14, 1992; See Attachment B. In addition, the Commission went through a period in 1992 and 1993 when microwave licenses were not issued. SBMS has received microwave licenses issued after January 16, 1992 for new 2 GHz paths, which suggest that they are primary in nature. Furthermore, SBMS has made major and minor modifications for microwave paths that were originally licensed as primary paths prior to January 16, 1992, and received licenses with notations that these licenses are now secondary in nature. These paths should have retained their primary status following the major or minor modifications according to the May 14, 1992, Public Notice (See Attachment B).

As a result, incumbent microwave licensees may find it difficult to establish the primary status of microwave paths and, therefore, find it difficult to establish their right to relocation benefits under the Commission's rules. The Commission should seek additional information in this NPRM from other microwave licensees to determine whether other licensees have experienced similar results in licensing both new and modified microwave paths. If so, then the Commission should establish rules which clearly delineate information which an incumbent microwave licensee must provide to

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other PCS operators.